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IN THE

Supreme Court of the United States

October Term, 1963

No. 450

PAUL RHODES, *Petitioner*,

vs.

CLARENCE A. H. MEYER, ET AL., *Respondents*.

PAUL RHODES, *Petitioner*,

vs.

RICHARD M. VAN STEENBERG, ET AL., *Respondents*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Paul Rhodes, prays that Writs of Certiarori issue to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled causes on August 5, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported at — F. 2d — (1964). The

Judgments of the Court of Appeals are reprinted as Appendix B.

The opinions of the District Court are reported in the Federal Supplement *Rhodes v. Meyer,* 225 F. Supp. 80 (1963) consisting of 32 pages; *Rhodes v. Van Steenberg* is reported at 225 F. Supp. 113 (1963) consisting of 22 pages in the Federal Supplement; because of the voluminous nature of these opinions, the high cost of printing, together with the fact that the opinions are readily available in the Federal Supplement, they are not reprinted in this Petition's Appendix, and Petitioner hereby moves the Court to waive such printing in the Appendix for the reasons stated.

JURISDICTION

The judgments of the Court of Appeals were entered on August 5, 1964. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. #1254 (1).

QUESTIONS PRESENTED

1. Whether the District Court and Court of Appeals Eighth Circuit are at liberty in considering the Motion to Dismiss the Complaint to go beyond the four corners of the Complaint in search of evidence to defeat allegations of Complaint, and does such search violate due process of law of Fifth Amendment of the United States Constitution.

2. Whether Petitioner Paul Rhodes stated upon face of his Complaint (R. 5 to 18, *Rhodes v. Meyer,* 17580; 2 to 12, *Rhodes v. Van Steenberg,* 17588) and within four corners of said Complaint and his supportive documents a cause of action for damages under 42 U. S. C. A. 1983 and 1985

when he alleged that Contempt of Court is not a crime in Nebraska (R. 7, *Rhodes v. Van Steenberg*, 17588); that he was tried in absentia; sentenced to 9 months hard labor (involuntary servitude) in Nebraska State Penitentiary in absentia; arrested without a warrant; discharged by final judgment of writ of habeas corpus and set at large for the reason the contempt judgment was void and repugnant to Thirteenth and Fourteenth Amendments of the United States Constitution; Nebraska Supreme Court suspended execution of contempt judgment; again arrested without warrant; defendants committed Petitioner to hard labor (involuntary servitude) and serving sentence, in contempt of Order of Nebraska Supreme Court suspending said sentence; denied necessary books, papers, etc. to perfect his Appeal of Contempt Case to Nebraska Supreme Court; released from penitentiary by expiration of sentence; held as safekeeper, thereafter, by sheriff in contempt case; released on bail; rearrested without revocation of bail without warrant; again committed to hard labor (involuntary servitude); again forced to serve contempt sentence through expiration of sentence; twice forced to serve said void sentence; Civil Rights case defeated by fraud perpetrated on Federal Court by defendants; allegations of Complaint defeated by false and fraudulent affidavits by defendants. (R.2 to 12, *Rhodes v. Van Steenberg*, 17588, and R. 4 to 17, *Rhodes v. Meyer*, 17580).

3. Whether State and County Officials can be sued under 42 U. S. C. A. 1983 and 1985 Federal Civil Rights Act for damages arising from IV, V, VI, VIII, XIII and XIV, due process and equal protection clauses Amendments U. S. Constitution and Article I, Section 9 of the United States Constitution for violation by said officers.

4. Whether State of Nebraska can imprison at hard labor (involuntary servitude) on a charge of contempt

(contempt not being a crime in Nebraska) and whether such imprisonment violates the provisions of the Thirteenth Amendment of the United States Constitution.

STATUTES INVOLVED

R. S. #1979 (42 U. S. C. A. #1983):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U. S. Constitution, Amendment 8:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. Constitution, Amendment 13:

> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Article I, Section 9, U. S. Constitution:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Other statutory and constitutional provisions involved are:

28 U. S. C. (1958 ed.) #1343 (28 U. S. C. A. #1343).
28 U. S. C. (1958 ed.) #1331 (28 U. S. C. A.

#1331).
R. S. #1980 (42 U. S. C. A. #1985 (3)).
U. S. Constitution, Amendments 4, 5, 6, and 14.

These provisions are reprinted in Appendix D to this petition.

STATEMENT

Petitioner brought this action for damages, alleging violation of his civil rights under the IV, V, VI, VIII, XIII, XIV due process and equal protection clauses Amendments U. S. Constitution, and Article 1, Section 9 of the United States Constitution and under the 42 U. S. C. A. 1983 and 1985, in the United States District Court for the District of Nebraska against County Officials, State Officials and Nebraska State Bar Association members.

On December 3, 1963 and December 16, 1963 the District Court, on considering defendants' motion to dismiss, dismissed the complaint for failure to state a claim and on ground that defendants are immune to the United States Constitution and Federal Civil Rights Act. On August 5, 1964, the Court of Appeals affirmed, for the same reasons.

The complaints asserted:

Contempt of Court is not a crime in Nebraska. (R. 2 to 12, *Rhodes v. Van Steenberg*, 17588 and R. 5 to 17, *Rhodes v. Meyer*, 17580)

November 21, 1960 Paul Rhodes was tried in absentia for contempt of court (not a crime in Nebraska). On same day Paul Rhodes was sentenced to nine months at hard labor (involuntary servitude). (R. 9, *Rhodes v. Meyer*, 17580 and R. 5, *Rhodes v. Van Steenberg*, 17588).

December 23, 1960 Nebraska State Supreme Court suspended execution of contempt sentence (not a crime). (R. 6)

January 16, 1961 arrested without warrant for commitment to penitentiary to serve said sentence (hard labor). (R. 6, *Rhodes v. Van Steenberg*, 17588)

January 16, 1961 secured writ of habeas corpus from District Court of Cheyenne County, Nebraska on grounds judgment was void and repugnant to the Thirteenth and Fourteenth Amendments United States Constitution constituting involuntary servitude without conviction of a crime. (R. 6, *Rhodes v. Van Steenberg*, 17588)

Discharged on same day and set at large. Said judgment granting writ of habeas corpus and setting at large was not appealed and became final judgment. (R. 7 *Rhodes v. Van Steenberg*, 17588)

January 23, 1961 Paul Rhodes was arrested again without warrant by defendants. Denied counsel. Held incommunicado, denied access to Courts of Cheyenne County. Transported 400 miles. On same day was committed to hard labor (involuntary servitude) in Nebraska State Penitentiary without the charge or conviction of a crime in contempt of Order of Nebraska Supreme Court suspending said sentence, (R. 8, *Rhodes v. Van Steenberg*, 17588) and in contempt of habeas corpus writ and discharge. Held incommunicado. Forced to serve sentence through expiration of sentence, July 5, 1961. (R. 6 to 9, *Rhodes v. Van Steenberg*, 17588)

July 6, 1961 Paul Rhodes was held as safekeeper for sheriff of Morrill County, Nebraska. (R. 9, *Rhodes v. Van Steenberg*, 17588)

November 21, 1961 Paul Rhodes was rearrested by defendants without revocation of bail and again without warrant on private property at Fontenelle Hotel, Omaha, Nebraska, held incommunicado in Douglas County Jail, denied acces to Courts of Douglas County. (R. 9 and 10, *Rhodes v. Van Steenberg,* 17588)

November 2, 1961 Paul Rhodes was again committed to hard labor (involuntary servitude) to the Nebraska State Penitentiary at Lincoln, Nebraska, 70 miles away, Lancaster County, to serve the contempt sentence the second time through second expiration of sentence, July 29, 1962. (R. 10 and 11, *Rhodes v. Van Steenberg,* 17588)

Civil Rights Case *Rhodes v. Houston,* D. C. Neb., 202 F. Supp. 624, aff'd. 8 Cir., 309 F. 2d 959, cert. denied, 372 U. S. 909, defeated by false and fraudulent affidavits and the Court taking judicial notice and going beyond face of the Complaints in an effort and search of what the Court thought were facts to defeat allegations of Complaints. (R. 8 to 13, *Rhodes v. Meyer,* 17580)

The District Court and the Eighth Circuit in cases at bar went beyond faces of the Complaints taking judicial notice and defeating allegations of the Complaints while considering Motion to Dismiss without trial on the merits.

REASONS FOR GRANTING WRITS

1. The Eighth Circuit's opinion in the cases at bar sustaining the District Court's findings that the said District Court could act as attorney for the defendants, and go beyond the Complaints and supporting documents while considering Motions to Dismiss in search of documents and opinions to defeat allegations of Complaints, squarely conflicts with the recent opinion of this Court, *Cooper v.*

Pate, 84 S. Ct. 1733 (1964). This Court held that allegations of the Complaints must be taken as true while considering Motion to Dismiss.

> "Taking as true the allegations of the complaint, as they must on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it. See Pierce v. LaVallee, 293 F. 2d 233 (C. A. 2d Cir.) Sewell v. Pegelow, 291 F. 2d 196 (C. A. 4th Cir.)."

The District Court in its opinions in the cases at bar, 225 F. Supp. pp. 90, 109, again at 120, 125, 126 clearly explains that the District Court went beyond face of Complaints in search of documents and evidence that the Court thought supported the defeating of the allegations of the Complaints without a trial and without an opportunity to defend against the Court's findings and production of evidence. This was clearly a denial of due process of law to this Petitioner and repugnant to the Fifth Amendment of the United States Constitution. The District Court found while considering the motion to dismiss that the Petitioner had not been twice forced to serve said sentence at hard labor. The Court of Appeals of the Eighth Circuit affirmed, making the same violation.

The Eighth Circuit further defeated the allegations of the Complaints while considering Motion to Dismiss by finding the Petitioner had not been held incommunicado and had not been denied reasonable access to the courts. This is contrary to Complaints where he had been held through expiration of sentence before being permitted to make bail. (R. 7 to 9, *Rhodes v. Van Steenberg*, 17588)

2. The Eighth Circuit's construction holding State and County Officials immune to 42 U. S. C. A. #1983 and #1985 Federal Civil Rights Acts squarely conflicts with

this Court's decision, *Cooper v. Pate*, 84 S. Ct. 1733 (June 22, 1964), *Monroe v. Pape*, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, *McNeese v. Board of Ed. for Community Unit School Dist. 187, Cahokia, Ill.*, 83 S. Ct. 1433, *Egan v. City of Aurora*, 365 U. S. 514, 81 S. Ct. 684, 5 L. Ed. 2d 741 in which this Court held none of the following State Officials immune to respond in damages to the United States Constitution or to the Federal Civil Rights Act: City commissioners, judges, police officers, sheriff, deputy sheriff, prosecuting attorney, and the assistant prosecuting attorney. This is amplified by *Johnson v. Crumlish*, 224 F. Supp. 22, p. 25.[1] The opinion of the Eighth Circuit Court of case at bar is in strict conflict with the opinions of this Court.

3. The Eighth Circuit's construction of R. S. #1979 (42 U. S. C. A. #1983 and #1985) and XIV Amendment in this case holding State and County Officials cannot be sued squarely conflicts with decisions of the Third Circuit, *Pickering v. Pennsylvania*, 151 F. 2d 240[2], sustained by opinion

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1. **Johnson v. Crumlish, 224 F. Supp. p. 25: "The public officer defendants further contend that they are immune from civil liability under the Civil Rights Act. This contention has been specifically rejected by the Supreme Court in Monroe v. Pape, supra, and particularly in Egan v. City of Aurora, 365 U. S. 514, 81 S. Ct. 684, 5 L. Ed. 2d 741 (1960), wherein the Supreme Court reversed the Seventh Circuit which had held the following individuals to be immune from liability: City Commissioners, Counsel for the City, Police Chief, Police Officers, Sheriff, Deputy Sheriff, Justice of the Peace, States Attorney and Assistant States Attorney.**

"The individual defendants, a private attorney and his client, argue that they are immune from liability under Civil Rights Act because the acts of private individuals are not within the purview of the Civil Rights Act #1983. While the main purpose of the Civil Rights Act is to protect the Fourteenth Amendment rights of all citizens from encroachment by arbitrary state action, individuals who allegedly joined or cooperated with state officers who acted under color of state law, are subject to liability under the Civil Rights Act. Pickering v. Pennsylvania R. Co., 151 F. 2d 240 (3 Cir. 1945); Valle v. Stengle, 176 F. 2d 697, 3 Cir. (1949)."

2. **Pickering v. Pennsylvania, 151 F. 2d 240. "The absolute privilege was extended even to conduct of judicial officers dictated by malice. But the privilege as we have stated was a rule of common law. CONGRESS POSSESSED THE POWER TO WIPE IT OUT. We think that the conclusion is irresistible that Congress by enacting the Civil**

of *Johnson v. Crumlish*, 224 F. Supp. 22 (1963).[3]

Petitioner's Complaints would have been sustained in Third Circuit. This conflict is further brought to light by the Eighth Circuit in case at bar, p. 18 of opinion, citing *Norton v. McShane*, 5 Cir., —— F. 2d —— (1964). The *Norton v. McShane*[4] opinion does not support the opinion

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Rights Act SUBJUDICE intended to abrogate the privilege to the extent indivated by that act AND IN FACT DID SO. Section 1 of the third Civil Rights Act explicitly applied to 'any person'. R. S. Section 1979 applies to 'Every Person'. We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful portent to the judiciary of the several states. See the statement of Chancellor Kent in Yates v. Lansing, 1810, 5 Johns, N. Y., 282, 291, 298. But the policy involved is for Congress and not for the courts. Assuming, as we think we must, that the provisions of Section 1 of the Civil Rights Act must be considered with qualification set out in the last paragraph of foot note 12, infra, as in pari materia with Section 20 of the Criminal Code under consideration in the Screws case, the conclusion we have expressed is foreshadowed by that decision, by the Classic case, supra, and by the decision of the Supreme Court in the case of Ex Parte Virginia and Virginia v. Rivers, supra." (Emphasis supplied)

3. Johnson v. Crumlish, 224 F. Supp. 22, 1963. "In Egan v. City of Aurora, 275 F. 2d 377, the Seventh Circuit relied upon its prior decision in Monroe v. Pape, 272 F. 2d 365, which was also reversed by the Supreme Court, supra, and Tenney et al. v. Brandhove, 341 U. S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), which is presently relied upon by the public officer defendants in this action."

4. In Norton v. McShane, 5 Cir., June 1, 1964, — F. 2d ——, the Court said: "Up to this time we have not referred to cases brought under Civil Rights Acts, such as Lewis v. Brautigam, 5 Cir. 1955, 227 F. 2d 124. The question involved in these cases is the extent, if any, to which the Civil Rights Acts have abrogated the immunity doctrine. While it is clear that common-law immunity afforded legislative and judicial officers applies in suits under the Civil Rights Acts, there remains much uncertainty as to the extent to which immunity for subordinate executive officials applies, if it applies at all. In view of our conclusion later in this opinion that the instant suits are not within the purview of the Civil Rights Acts, we do not decide at this time the scope of official immunity under these statutes. We need only say the doctrine may be given more limited application in those suits than it has been given at common law."

Foot Note

See generally, Nale, The Doctrine of Official Immunity under the Civil Rights Act, 68 Harv. L. Rev. 1229 (1955); Comment, Civil Liability of Subordinate State officials under Civil Rights Act and doctrine of Official Immunity, 44 Calif. L. Rev. 887 (1956). The problem was first raised in Pickering v. Pennsylvania R.R., 3 Cir. 1945, 151 F. 2d 240. It was discussed, but questionably resolved in Hoffman v. Hayden, 9 Cir. 1959, 268 F. 2d 280, 298-300. See also Rhodes v. Houston, D. Neb. 1962, 202 F. Supp. 624, aff'd per curiam, 309 F. 2d 959, cert. denied, 372 U. S. 909.

of the Eighth Circuit that State and County Officials are immune but points to the conflict between *Pickering v. Pennsylvania*, supra, and *Rhodes v. Houston*, supra.

The Court in said case did not decide the immunity question.

The Eighth Circuit in its opinion in the case at bar cites the case of *Nesmith v. Alford*, 5 Cir., 318 F. 2d 100 (1963); as supporting their theory of immunity but upon reading the case it did not support the immunity theory but reversed the case for award of damages. The Court said:

> "The plaintiffs who have perfected their appeal to this Court as appellants are Dr. and Mrs. Richard Nesmith. Filling out the cast of characters as Defendants—appellees are Commissioners of Public Affairs Sullivan, Chief of Police Ruppenthal, Desk Captain Erland, and Police Sergeant Alford.
>
> "Certainly since Monroe v. Pape, 1961, 365 U. S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492, violation of some of the Civil Rights of these plaintiffs was established as a matter of law. These included the freedom from unlawful arrest, freedom of speech and freedom of association. This inculded the freedom of a white man peacefully to associate with Negroes in a public restaurant free from actual or threatened arrest by police officers as a means of enforcing racial segregation.
>
> "Thus, for example, the commencement and prosecution of unfounded criminal prosecution might under certain circumstances constitute, not only malicious prosecution under state law (See Part IV) but a violation of Civil Rights as well."

The law is now different in different Circuits of the United States. This is pointed out by the Eighth Circuit's opinion in cases at bar on p. 18. The Circuit Court points

out that this Petitioner has recovered a substantial judgment in Tenth Circuit against penitentiary guard Harry W. Edmondson on a similar complaint upon same basic cause of action in the United States District Court for the District of Kansas. (Copy of Judge's Instructions, *Rhodes v. Edmondson,* Appendix E this Petition.)

The law is different in different Circuits at the present time. Whether or not you state a claim depends upon in what Circuit the defendant resides.

The Kansas U. S. District Court grants Petitioner relief. The Nebraska U. S. District Court and the Eighth Circuit's Court of Appeals denies Petitioner relief on substantially the same Complaints. The Eighth Circuit calls our attention to that on p. 18 of their opinion. (Appendix E this Petition.)

4. The Eighth Circuit's opinion that the case of *Rhodes v. Houston,* 202 F. Supp. 624 is Res Judicata and Stare Decisis to the cases at bar and the habeas corpus ruling of inapplicability of doctrine of finality of litigation does not apply and that *Sanders v. United States,* 373 U. S. 1 is inapplicable and p. 18 of Court's opinion in case at bar that no authorities are cited for making this case come under habeas corpus rule. This ignores their own citation of *Rhodes v. Houston,* supra, which applied to habeas corpus rule at 202 F. Supp. p. 633 as follows:

> "Additionally, the court believes that under these circumstances, the rule that in a federal habeas corpus action the court may judicially notice the transcript of trial proceedings and briefs which had been before the Nebraska Supreme Court is flexible enough to allow the same procedure in a case such as this. See Wilson v. Sigler, 285 F. 2d 372 (8th Cir., 1961). Starkweather v. Greenholtz, 267 F. 2d 858 (8th Cir.,

1959), cert. denied 360 U. S. 921, 79 S. Ct. 1442, 3 L. Ed. 2d 1537 (1959)."

The Court having determined that the habeas corpus rule in *Rhodes v. Houston,* supra, was applicable in going beyond face of complaint to defeat complaint, the doctrine of Res Judicata and Stare Decisis would not be applicable to defeat the Complaints. The rule of *Sanders v. United States* should be applied:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government (is) always (to) be accountable to the judiciary for a man's imprisonment,' Fay v. Nola, supra, 372 U. S. at 402, 83 S. Ct., at page 829, access to the courts on habeas must not be impeded. The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ."

It was determined by District Court of Cheyenne County, January 16, 1961, by final Judgment, *Rhodes v. Schulz* (R. 6 and 7, *Rhodes v. Van Steenberg,* 17588) that Morrill County District Court Contempt of Judgment of November 21, 1960, Case 4839 was *void* and repugnant to 13th and 14th Amendments of the U. S. Constitution. Said Cheyenne District Court Judgment is Res Judicata and Stare Decisis that this Petitioner was not convicted of a crime and was imprisoned in violation of the 13th and 14th Amendments of U. S. Constitution. Petitioner's rearrest thereafter was repugnant to Article I, Section 9, suspending Writ of Habeas Corpus within Court Order authorizing said arrest.

It is further called to this Court's attention that in *Rhodes v. Edmondson,* supra, the U. S. District Court in the Tenth Circuit not only held Edmondson not immune to a Civil

Rights suit, but made a punitive example out of him as a warning to all others against such lapse of duty and violation of Federal Constitutional Rights of this Petitioner. The commitment to involuntary servitude without the conviction of a crime, contempt of court not being a crime in Nebraska.

This Court is directed to Appendix in this Petition, Instruction of Court to Jury T-3405, U. S. District Court of Kansas, *Rhodes v. Edmondson*, supra, Instruction No. 8, at p. 16 of said Instructions, which reads:

> "After you have determined, under these instructions, the amount of actual damages, if any, that plaintiff has proximately sustained from being deprived of his civil rights by this defendant, you will then determine the amount that plaintiff is entitled to recover as punitive damages.
>
> "Punitive or exemplary damages is commonly called smart-money. If the conduct of a defendant is such as to amount to a wanton and reckless disregard of a right of the plaintiff in the enjoyment of his rights as a Citizen, and discloses such gross neglect of duty by a defendant as to evince a reckless indifference to the rights of that plaintiff, then a plaintiff is entitled to punitive damages. In this case punitive damages should be assessed and in assessing such damages you may take into consideration the following items:
>
> (1) The expense in preparation for trial by plaintiff; and
>
> (2) An amount as shall be an example to others to deter them from such conduct.
>
> "The amount should not be so small as to be trifling nor so large as to be unjust, but such as candid and dispassionate minds can approve as a punitive example and as a warning to others against a similar lapse of duty."

The Court should grant these Writs and consider the conflict of law between the Circuits and exemplified by *Rhodes v. Edmondson*, supra, on the same set of facts as the case at bar.

It is not right for the Courts to make a punitive example out of Edmondson to all others, and allow those who directed Edmondson to go free, be immune, and condone the acts in the case at bar. Your attention is further directed to Instruction 3, at p. 13 of said Instructions of Court, *Rhodes v. Edmonrson*, supra, Appendix E this Petition:

> "You are instructed that Section 1983 of Title 42, United States Code provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> "You are further instructed that Federal District Courts have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
>
> "You are further instructed the action here is a proper proceeding for redress."

It is time this Court resolves this conflict between the Circuits.

5. The Eighth Circuit's construction of the XIII Amendment of the U. S. Constitution that hard labor (involuntary servitude) can be imposed without the conviction of a crime cites the case of *Draper v. Rhay*, 9 Cir., 315 F. 2d 193, 197. In said case the Ninth Circuit was dealing with a criminal case, a defendant serving two consecutive terms for armed robbery, which were two felony charges coming within the exception of the Thirteenth Amendment providing for involuntary servitude:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The case at bar was contempt of court, which is not a crime in Nebraska, and not coming within exception of punishment for a crime. This the Nebraska Supreme Court pointed out in *Smolczyk v. Gaston*, 147 Neb. 681, 24 N. W. 2d 362, to-wit:

> "The constitution of this state provides: 'There shall be neither slavery nor involutary servitude in this state, otherwise than punishment of crime, whereof the party shall have been duly convicted.' Constitution Art. 1, Sec. 2.
>
> "Under the holding of this court contempt is not a crime though in the nature of a criminal proceeding. Butterfield v. State, 144 Neb. 388, 13 N. W. 2d 572. Imprisonment is not servitude, but labor enforced as punishment is involuntary servitude. Flannagan v. Jepson, 177 Iowa 393, 158 N. W. 641. In State v. West, 42 Minn. 147, 43 N. W. 845, it is said: 'There is nothing better settled than that enforced labor is "involuntary servitude" within the meaning of such constitutional provision.' And in Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89, it is stated: 'Imprisonment at hard labor, compulsory and unpaid, is in the stron-

gest sense of the words, involuntary servitude for crime; * * *.'

"The definition of involuntary servitude being thus established, it follows that the sentence imposing a jail term at hard labor for contempt of court is invalid as being violation of the cited constitutional provision.* * *"

The Iowa Supreme Court has fully explained this exception to the Thirteenth Amendment as applies to contempt in *Flannagan v. Jepson,* 177 Iowa 393, 158 N. W. 641:

"(1) Imprisonment is not servitude. Labor enforced as punishment is 'involuntary servitude.' If not, what is involuntary servitude as punishment for crime which the constitution excepts from its otherwise sweeping prohibition? The very language of the Constitution, which prohibits involuntary servitude except as punishment for crime, demonstrates that, in the minds of the framers of that instrument, enforced labor as punishment for crime is such servitude, and that the exception was necessary to the continued right of legislature and courts to impose it."

The Court should grant certiorari to straighten out the false impression the Court of Appeals of Eighth Circuit has given that involuntary servitude (hard labor) can be imposed without the conviction of a crime.

It is as stated in *United States v. Fay,* 225 F. Supp. 677 (1963) at page 681:

"The violation of a constitutional right is a continuing one. Thus, Petitioner's right was violated not only at times of his arrest and trial, but continues to be violated to this day while he is sitting in prison."

The United States Supreme Court has held regarding the XIII Amendment that the arrest with the intent to

impose involuntary servitude without the conviction of a crime violates the XIII Amendment of the United States Constitution in *United States v. Gaskin*, 320 U. S. 527:

> "The District Court held that the statute imposes no penalty for an arrest with intent to compel the performance of labor or service unless the person arrested renders labor or service for a master following the arrest.
>
> "We think this was error. Section 269 derives from # 1 of the Act of March 2, 1867, which abolished and prohibited the system known as peonage in any territory or state, nullified any law, ordinance, regulation or usage inconsistent with the prohibition, and added criminal sanctions in the language now constituting #269. The Act was passed further to implement the Thirteenth Amendment and is directed at individuals whether or not acting under color of law or ordinance. * * *
>
> "The Judgment is Reversed."

CONCLUSION

There is a conflict among the Circuits. The conflict exists on the same case and same facts. The lower Courts are in confusion. The leading Supreme Court cases have been rejected or ignored below. The Constitutional rights of an innocent person, neither charged with or convicted of crime, have been outrageously violated.

For the foregoing reasons Petition for Writs of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Eighh Circuit

No. 17,580.

Paul Rhodes,

Appellant,

v.

Clarence A. H. Meyer, et al.,

Appellees.

No. 17,588.

Paul Rhodes,

Appellant,

vs.

Richard M. Van Steenberg, et al.,

Appellees.

} Appeals from the United States District Court for the District of Nebraska.

[August 5, 1964.]

Before Van Oosterhout, Blackmun and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

Plaintiff Paul E. Rhodes appeals from final judgment dismissing his complaint in each of these cases as to all defendants upon motions to dismiss filed by defendants. These cases were heard separately below. They were argued together here. We will deal with both cases in this opinion as many of the parties and issues are common and the disposition of both cases is controlled by the same underlying principles. Case No. 17,580 (No. 01682 below) will be referred to as Meyer. Case No. 17,588 (No. 01784 below) will be referred to as Van Steenberg.

Plaintiff's causes of action are based upon asserted violation of federal civil rights arising out of his alleged

wrongful conviction of contempt of court by the Nebraska State District Court and the service of the sentence imposed. Substantial actual and exemplary damages are claimed.

Plaintiff in brief describes his action as a civil rights action to recover damages from the defendants for twice imposing involuntary servitude in violation of the XIII and XIV Amendments to the United States Constitution without conviction for a crime as a result of a conspiracy among the defendants consisting of State Supreme Court Justices, State District Judges, prosecuting attorneys, Clerks of Court, sheriffs, law enforcement officers, prison officials and members of the Nebraska integrated bar. Plaintiff's double imprisonment claim is based upon his contention that he twice served his sentence, once while he was held in the penitentiary pending appeal from his conviction and prior to his posting bail and again when he was compelled to serve a sentence after mandate issued by the Supreme Court dismissing his appeal. Complaint is likewise made of being held incommunicado while in the penitentiary and mistreatment in other respects. Deprivation and violation of rights guaranteed by the IV, V, VI, VII and VIII Amendments and Article 1, Section 9 of the United States Constitution are likewise claimed.

Judge Delehant, with great care and thoroughness, has accurately described the pleadings and the extensive history of this litigation in excellent memorandum opinions reported at 225 F. Supp. 80 (Meyer) and 225 F. Supp. 113 (Van Steenberg).

Judge Van Pelt in *Rhodes* v. *Houston*, D. C. Neb., 202 F. Supp. 624, aff'd, 8 Cir., 309 F. 2d 959, cert. denied, 372 U. S. 909, a previous civil rights action of the plaintiff

based upon the same violation of his rights here asserted, largely relied upon by Judge Delehant in the present case, fairly describes such cause of action and sets out with extensive supporting authority the law of judicial immunity and related immunity of public officials carrying out judicial orders.[1]

Since a full and fair description of the pleadings, facts and issues involved in the multiple cases instituted by the plaintiff is readily available in the opinions just mentioned, we do not feel justified in consuming the considerable space which would be required to set such material forth in detail here. Such matters to the minimum extent necessary will be set out in our discussion of the issues to which we now turn our attention.

I. JURISDICTION

No diversity of citizenship here exists. Jurisdiction is based exclusively upon the Civil Rights Act, 42 U.S.C.A. §§ 1981, 1983, and 1985 to 1988. Defendants in each action urged that the complaint be dismissed for want of jurisdiction. Upon this issue, Judge Delehant states:

> "And the writer of this memorandum acknowledges grave doubt whether, even on paper, the plaintiff has brought himself under the jurisdictional coverage of the Civil Rights Act, whether that Act ever has been or, even with its current liberal application, is, operative to confer jurisdiction on this court to determine, as between citizens of Nebraska, controversies that

1. See also the following Nebraska Supreme Court opinions casting some light upon the issues here present: **Rhodes v. Houston**, 108 N. W. 2d 807 (habeas corpus); **Rhodes v. Sigler**, 109 N. W. 2d 731 (habeas corpus); **Rhodes v. Crites**, 113 N. W. 2d 611 (false imprisonment); **Rhodes v. Star Herald Printing Co.**, 113 N. W. 2d 658 (libel); **McFarland v. State**, 109 N. W. 2d 397 (upholds conviction of Judge McFarland for contempt closely related to the contempt for which plaintiff was convicted).

> arise out of what is essentially a suit for damages on account of false imprisonment or malicious prosecution, or both." 225 F. Supp. 80, 96. See 225 F. Supp. 113, 128-29.

We fully share the trial court's doubt that jurisdiction exists. See *Sarelas v. Sheehan,* 7 Cir., 326 F. 2d 490; *Hulburt* v. *Graham,* 6 Cir., 323 F. 2d 723, 725; *Byrd v. Sexton,* 8 Cir., 277 F. 2d 418; *Basista v. Weir,* W.D.Pa., 225 F. Supp. 619, 625 to 628.

Monroe v. Pape, 365 U. S. 167, definitely enlarges the scope of civil rights litigation. There is a marked distinction factually between that case and this. In *Pape,* the search appears to have been clearly illegal and no prosecution followed. Here plaintiff's contempt conviction which gave rise to the imprisonment has become final by reason of the dismissal of his appeal by the Nebraska Supreme Court for want of prosecution. As Judge Delehant points out, a number of state habeas corpus petitions based upon the conviction have been considered and denied. Moreover, Judge Van Pelt in *Houston* fully considered the constitutional attack here made upon the contempt conviction and found such conviction to be in all respect valid. As has been pointed out, this decision has been affirmed by this court and certiorari has been denied. It is difficult to see how the imprisonment imposed as a result of such conviction can possibly afford a basis for a violation of plaintiff's civil rights.

Finality of this protracted series of litigation arising out of a common source is highly desirable. In our view, Judge Delehant's decision upon the merits is clearly right for reasons hereinafter discussed. Hence, like the trial court, we shall assume without so deciding that jurisdiction exists.

II. RES JUDICATA/CLAIM PRECLUSION.

The defendants in *Meyer* and *Van Steenberg* who were also defendants in *Houston* asserted the defense of res judicata in their various motions to dismiss and such defense is maintained in these appeals. After a thorough, and we believe accurate, examination and comparison of each of the actions below with *Houston,* Judge Delehant concluded:

> "[T]his court would be on solid ground if it were to regard *Rhodes v. Houston* . . . as dispostive adversely to the plaintiff herein, and in favor of all of the defendants hereto except [those who were not prior defendants and the Justices of the Supreme Court of Nebraska who, although prior defendants, were not previously charged as liable in damages] upon all of the plaintiff's claim herein, insofar as it rests upon facts that existed when the ruling in *Rhodes v. Houston* . . . was made." 225 F. Supp. 80, 106, Cf. 225 F. Supp. 113, 128.

The doctrine of res judicata is especially applicable where protracted and multiple litigation of similar issues appears to be in the offing. Thus, without desiring to be repetitive of the extreme detail in which the district court examined the pleadings, this court shall reexamine them to the extent necessary to determine if either res judicata or stare decisis applies thereto.

This court recently had the occasion to discuss the test of sameness of causes of action and the following test was applied:

> " 'The primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action. *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, . . .' " *Engelhardt* v. *Bell & Howell Co.,* 8 Cir., 327 F. 2d 30, 32.

The district court below observed that the opinion by Judge Van Pelt in *Houston* is "a notably correct and carefully reasoned deliverance in a case which was indistinguishable from the present one, whose setting and basic averments were, in fact had to be, identical with those now advanced by plaintiff. The material out of which both of them have been made has been the experience over a limited period of time of one man with a single, though not entirely simple, problem." 225 F. Supp. 113, 131. Cf. 225 F. Supp. 80, 92-93.

The case we are here considering and *Houston* allege similar conspiracies under the same Civil Rights Act. These conspiracies allegedly generated from the same source—a trial in state court for contempt of court in which the plaintiff herein was the defendant. The core of plaintiff's alleged wrongful treatment or handling by the various officials named as defendants in these cases stems from what plaintiff terms his trial in absentia. Indeed, were this an issue yet to be determined, we would certainly be inclined to drop the axe on this litigation less quickly; but the issue concerning the denial of the motion for continuance and the termination of the contempt trial without the presence of plaintiff was thoroughly discussed by Judge Van Pelt in *Houston* and adequately and correctly determined by him to be no basis for a claim against these defendants. 202 F. Supp. 624, 630-33. This finding reams the core out of plaintiff's complaints.

Judge Delehant concluded after an analysis of the pleadings that:

> "It may accurately be said that the claim which the plaintiff undertakes to make out in his amended complaint herein was—and is—the claim which, in multiple counts, he tried to assert in [*Houston*], plus two

> features which briefly reflected, are (a) the completion after the ruling of Judge Van Pelt, of his imprisonment and (b) the use of alleged misstatements, both on affidavits and in briefs and oral argument, which is charged to have occurred in the course of the *Houston* case itself. But the completion of the imprisonment added only in degree, not in kind, to the claim the plaintiff tendered in that case. And, touching the alleged misrepresentations in the course of that litigation, it is sufficiently observed that the *Houston* case itself provided the occasion, the framework and the forum, in which that conduct, if it occurred, should have been challenged and thwarted. Its reservation for the present occasion savors too strongly of 'second guessing.'" 225 F. Supp. 80, 108.

Thus, if this court agrees that the two additional features, supra, do not substantially change the claim in these cases from *Houston*, then at least to the identical parties in the actions, the doctrine of res judicata should apply.

The first feature—the completion of the imprisonment after the ruling in *Houston*—is the primary basis of the *Van Steenberg* case. In simple terms plaintiff asserts that he was required to serve his sentence two times in violation of his constitutional guarantee against involuntary servitude and cruel and unusual punishment. The first imprisonment took place during the period of time plaintiff's sentence was suspended pending appeal. Upon his confinement in the penitentiary, plaintiff sought a writ of habeas corpus against the Warden of the penitentiary. The Supreme Court of Nebraska affirmed the denial of the issuance of the writ, stating:

> "We need not determine here whether the issuance of the order of commitment on November 25, 1960, was regular or irregular. As to that the rule is: If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by

proceedings in error in the regular course of the law, but not by the writ of habeas corpus. *In re Application of Cole,* 103 Neb. 802, 174 N. W. 509, 848." (For a more recent case with the same holding, see *Van Bokelman* v. *Sigler,* Neb. 1963, 121 N. W. 2d 572.)

"We think it clear that from the 21st of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action.

"It appears from this showing that the sheriff had full authority under the provisions of section 29—1001, R. R. S. 1943, to hold relator in a 'secure and convenient place of confinement.'" *Rhodes v. Sigler,* 172 Neb. 439, 109 N. W. 2d 731, 733.

Plaintiff eventually posted bail on August 21, 1961, whereupon he was released from custody. However, during his period of freedom plaintiff failed to file briefs to perfect his pending review of the sentence for contempt within the statutory period which expired September 21, 1961, and on October 17, 1961, the Nebraska Supreme Court dismissed the error proceeding for that reason. Thus for no apparent reason plaintiff refused to take his argument that the state district court had no jurisdiction to sentence him to "hard labor" for contempt of court to the appellate level. Assuming such a sentence would be contrary to the Constitutional provisions against involuntary servitude, and disregarding the individual affidavits of the Warden and Deputy Warden stating that "Rhodes was not subjected to hard labor at any time during his residence in this institution nor labor of any other

description nor does this affiant intend to subject or allow Rhodes to be subjected to labor of any description during his residence at this institution," which were filed in the *Houston* case on December 18, 1961, this court doubts that it is the intention of the Civil Rights Act to allow a person knowledgeable of the procedures of the law to ignore his chance to have an error corrected and then attack the administrators of justice who were denied the opportunity to correct the error in an action for monetary damages.

It is here noted that plaintiff alleges he is an attorney at law. Judge Delehant in his opinion states plaintiff is a graduate of the University of Nebraska Law School and that he was admitted to the Nebraska Bar in 1943 and that he is an experienced practitioner. Plaintiff appeared pro se in these cases before us and personally argued the cases on appeal.

Nevertheless, the fact of the second imprisonment—the actual serving of the sentence—was before the court in *Houston* in such a degree as to make the application of res judicata justifiable. After a careful consideration of the filing dates in *Houston*, in relation to the periods of confinement of the plaintiff, Judge Delehant states:

> "Hence, his initial imprisonment was a completed fact, and his second imprisonment was in current progress when Judge Van Pelt's final ruling was made. The last six months of Mr. Rhodes' second imprisonment, indeed, occurred after Judge Van Pelt's final ruling. But the basic fact of even that imprisonment was then in current progress, and its threatened inception had earlier undergone the consideration of Judge Van Pelt, who had denied a prayer for its restraint, supra." 225 F. Supp. 113, 129.

The continuance of the second confinement is the natural

result of the decision in *Houston*, and since the court there found no basis for a civil rights action up to that point, certainly no new cause of action is created beyond that point, at least in regard to the two-time defendants. See *Engelhardt* v. *Bell & Howell Co.*, 8 Cir., 327 F. 2d 30, 35-36.

The second feature mentioned supra—the use of alleged misstatements in the *Houston* case itself—is the primary basis of the *Meyer* case, although the pleadings do relate somewhat to the second confinement also. Plaintiff alleged in *Meyer* that a number of the defendants conspired and secured from H. Snyder, Deputy Sheriff of Denver County, Colorado, a false affidavit to the effect that plaintiff had been served a Notice of Hearing in the contempt trial then pending, "knowing said affidavit of service of Notice of Hearing to be held on November 21, 1960, was a false affidavit . . . ." Thus plaintiff alleges a fraud upon the state district court in the contempt trial and further a fraud upon the federal court because a copy of said affidavit was filed in *Houston*.

In the determination of the immunity of Van Steenberg in *Houston*, Judge Van Pelt found from the plaintiff's complaint and a notice filed by plaintiff on November 2, 1960, that plaintiff had been present in earlier proceedings in the contempt trial. Thus jurisdiction of the court fully attacked both as to subject matter and as to person and such jurisdiction would continue until all issues were finally litigated as long as the accused was given due notice of his denial of continuance and an opportunity to be present and defend. On page 631 of 202 F. Supp. 624, Judge Van Pelt refers to plaintiff's complaint which sets out the November 21, 1960, order of Judge Van Steenberg reciting that plaintiff had been "duly notified of this hearing." Judicial notice was taken of Snyder's affidavit

as additional support of ample notice and opportunity to defend. Judge Van Pelt correctly justified such action, stating:

> "To hold that plaintiff has stated a claim against Judge Van Steenberg simply because it does not conclusively appear from plaintiff's complaint that he had notice of the November 21, 1960, hearing, when the fact that he did have notice plainly appears in documents filed in the case from which this action arose, would be to impose a heavy burden upon all those defendants and witnesses whose presence would otherwise be required at the hearing. Additionally, the court believes that under these circumstances, the rule that in a federal habeas corpus action the court may judicially notice the transcript of trial proceedings and briefs which had been before the Nebraska Supreme Court is flexible enough to allow the same procedure in a case such as this." 202 F. Supp. 624, 633.

It should be emphasized that plaintiff did not allege lack of notice in his complaint in *Houston*, but merely alleged that he was not present and was not represented by counsel. In addition, plaintiff does not actually deny receiving notice in his pleadings in *Meyer*, but alleges the negative pregnant to the effect that "said notice was not delivered to Paul R. Rhodes at 7:45 A. M. on the 15th day of Novemebr, 1960." Plaintiff asserts that he was unable to defend against this fraud because at the time the *copy* of the alleged false affidavit was filed in the *Houston* case on January 24, 1962, plaintiff was confined incommunicado in the Nebraska State Prison. But this does not explain why he did not raise this issue in his pleadings in *Houston* since the *original* alleged false affidavit was filed in the contempt case on November 18, 1960. The complaint in *Houston* was filed on September 21, 1961, a month after he was free on bail and during that month

he could have asserted the same issue on direct appeal had he been disposed to file his briefs. Thus we agree with Judge Delehant who found that "To the extent of its use in [the contempt trial], it was a matter for submission to Judge Van Pelt in [*Houston*] for it was initially used in the state court in November, 1960." 225 F. Supp. 80, 94.

Plaintiff alleges that the affidavits of the Warden and Deputy Warden, which pertained to the treatment of plaintiff and were previously referred to supra, were filed in *Houston* in furtherance of the conspiracy. Plaintiff moved to strike the affidavits on the general ground of "incompetent, irrelevant and immaterial and an undue encumbrance of the record" without alluding to any conspiratorial falsity. No direct ruling on said motion can be found in the record of *Houston,* however, a careful reading of the memorandum of Judge Van Pelt gives no indication that he relied upon such affidavits in reaching his conclusion. Plaintiff alleges that the false affidavits were referred to, along with other various falsehoods, by defendant Robert A. Nelson in oral argument and briefs before this court in *Houston.* As was already pointed out in a portion of the district court's decision quoted supra, this "savors too strongly of 'second guessing.'"

This court reiterated the applicable rule of res judicata in *Engelhardt:*

> "The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided." 327 F. 2d 30, 32.

Judge Delehant correctly determined that the causes of action here asserted are the same as asserted in *Houston* and that the added facts here pleaded do not make this a different cause of action. The basic wrong for which redress is asked is a conspiracy resulting in plaintiff's alleged wrongful conviction and imprisonment.

Plaintiff's reliance upon *Sanders* v. *United States*, 373 U. S. 1, as a basis for the inapplicability of the doctrine of finality of litigation in situations where life and liberty are at stake, is without merit. *Sanders* involved a 28 U. S. C. A. § 2255 motion. The court there held that the motion procedure is substantially equivalent to habeas corpus and that res judicata does not apply to such motions for the same traditional reasons that the doctrine does not apply to habeas corpus. No authorities are cited and no persuasive reason exists for applying the habeas corpus res judicata exception to a civil action such as this.

Plaintiff argues on appeal as he did below that res judicata cannot apply in these cases because the decision in *Houston* was not on the merits but merely on a motion to dismiss. The authorities cited by Judge Delehant at 225 F. Supp. 80, 105, adequately dispose of this argument and they establish that judgment entered on a motion to dismiss for failure to state a claim on which relief can be granted can support a defense of res judicata in a subsequent action. Judge Sanborn in *Sylvan Beach, Inc. v. Koch*, 8 Cir., 140 F. 2d 852, 860, quoted from Freeman on Judgments, 5th Ed., Vol. 2, § 740 where it was stated that "A judgment on the pleadings is on the merits if it determines the merits of the controversy as distinguished from the merits of the pleadings." See *Elorasynth Laboratories* v. *Goldberg*, 7 Cir., 191 F. 2d 877; 2 Moore's Federal

Practice ¶ 12.14 at 2267. The decisions on immunity of the various defendants in *Houston* were on the merits and thus preclude redetermination in these cases as to the immunity of these prior defendants: to wit, Richard M. Van Steenberg, Albert W. Crites, and Ted R. Fiedler, Nebraska District Court judges, Clarence A. H. Meyer, Attorney General of Nebraska, Cecil Brubaker, Assistant Attorney General, Rush Clarke, Special Assistant Attorney General, James L. Macken, County Attorney of Morrill County, George Turner, Clerk of the Nebraska Supreme Court, Virginia A. Schuetz, Clerk of the District Court of Morrill County, Norval Houston and Michael Linch, Sheriff and Deputy Sheriff of Morrill County, Carl Sanders and Leo Knudtson, Officers of the Nebraska Safety Patrol, Maurice Sigler and John Greenholtz, Warden and Deputy Warden of Nebraska State Penitentiary. All of the above named defendants were defendants in both *Houston* and *Meyer;* all of the above except Linch, Turner and Fiedler, were also named as defendants in *Van Steenberg.*

III. STARE DECISIS.

The trial court held that all defendants in the two actions before us, including those who were defendants in *Houston* and those who were not, were entitled to have their motions to dismiss sustained upon the basis of stare decisis, stating in support thereof:

> "But after thorough study of the present file, and of the factual history to which it directs the court, supra, it has been, and is, considered unnecessary to premise the present ruling either upon the doctrine of *res judicata,* or upon its related rule of estoppel by judgment, and more appropriate to poise it upon the application of the principle of *stare decisis.* In pursuing that course, *Rhodes* v. *Houston,* supra, is accorded persuasive significance, not as a mandatorily

controlling prior adjudication of the same case—or the essential features of it—but rather because, as a matter of legal reasoning, it is correct. In support, therefore, of the present ruling, the court now cites *Rhodes* v. *Houston* (D.C. Neb.) 202 F. Supp. 624, aff'd 309 F.2d 959, cert. den., 372 U. S. 909, 93 S.Ct. 724, 9 L.Ed.2d 719, and, without individual recollection, the many opinions cited in it, and Judge Van Pelt's penetrating analysis of them." 225 F.Supp. 80, 106; cf. 225 F.Supp. 113, 128.

The new defendants in *Meyer* are Dwain L. Jones, Assistant Attorney General of Nebraska, Robert A. Nelson, Special Assistant Attorney General of Nebraska, Gerald S. Vitamvas, Assistant Deputy Attorney General, George Lewis, the physician at the State Penitentiary,[2] and Peter E. Marchetti, H. B. Evnen and J. Arthur Curtiss, attorneys. Such attorneys and all defendant judges and prosecuting attorneys were made defendants by reason of their membership in the Nebraska State Bar Association.

Also named as defendants in *Meyer* are Robert G. Simmons, Edward F. Carter, Fred W. Messmore, John W. Yeager, Harry A. Spencer, Leslie Boslaugh, and Robert C. Brower, Justices of the Supreme Court of Nebraska. They were defendants in *Houston* on the third cause of action demanding injunctive relief but not on the causes of action demanding monetary relief. We have not applied res judicata as to the Supreme Court Justices although it might well be proper to do so. In any event, it is abundantly clear that the Justices of the Supreme Court of Nebraska were acting within their jurisdiction in performing the acts here complained of and that the doc-

2 The complaint against Dr. Lewis is that he refused to furnish certified copies of prison hospital records and that he altered prison records. The complaint does not allege any wrongful medical treatment but charges the same type of wrongs which were asserted against the warden. See pp. 89 and 109 of 225 F. Supp.

trine of judicial immunity requires a dismissal as to each of such Justices.

The new defendants in *Van Steenberg* are Robert A. Nelson, Special Assistant Attorney General of Nebraska, Gerald S. Vitamvas, Assistant Attorney General, Clarence S. Beck, Attorney General, Patrick E. Corrigan, Sheriff of Douglas County, and Jack Knudtson, Deputy Sheriff of Douglas County.[3]

A comparison of these new defendants with categories of immunities upheld in *Houston* reveals immediately that the only new classification is that of attorneys. Plaintiff asserted that their alleged actions "were under the color and authority of that office as Attorney at Law of the State of Nebraska, and the Nebraska State Bar Association, an offiical part of, organ of, and division of the State of Nebraska." The obvious lack of merit in this contention was completely ponited out in 225 F. Supp. 80, 93-94, 107. See *Skolnick v. Martin*, 7 Cir., 317 F. 2d 855 (1963).

In regard to the categories of officialdom previously determined immune in *Houston*, proper judicial administration requires us to follow such determination unless there has since been a significant change in the applicable law. Plaintiff relies upon *Monroe v. Pape*, 365 U. S. 167 (1961), for the contention that none of the defendants are immune under the Civil Rights Act and that the law set out in *Houston* is erroneous.

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3 All that is charged against the Sheriff and Deputy Sheriff of Douglas County is that on November 2, 1961, after mandate of the Supreme Court in the contempt conviction had issued, such officers aided Sheriff Norval Houston in arresting plaintiff in Omaha and kept him in jail at Omaha for safekeeping for several hours and then aided in his removal to the State Penitentiary for the service of his sentence. It is also alleged that while defendant was temporarily held in the Omaha jail he was denied counsel and a right to file petition for writ of habeas corpus.

Judge Van Pelt and this court which affirmed were very much aware of the *Monroe* case, as is evidenced by the following quotation:

> "The recent opinion of the United States Supreme Court in *Monroe v. Pape*, 365 U. S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) does not, as plaintiff suggests, overturn or modify the doctrine of judicial immunity in a federal civil rights action. An examination of all federal cases which have cited *Monroe* v. *Pape* reveals that it has not yet been considered for its effect, if any, upon the well established rule of judicial immunity. This court, therefore, relies upon its own reading of that case, and concluded that it has no effect upon the doctrine and is not here in point." *Rhodes* v. *Houston*, 202 F.Supp. 624, 629-30.

This court has also since made a survey of the cases citing *Monroe* to see what effect, if any, it may have on the traditional concepts of immunity. We find there is overwhelming support for the position that judicial immunity and its derivative quasi-judicial immunity have not been affected by *Monroe*. See *Harvey v. Sadler*, 9 Cir., 331 F.2d 387 (1964); *Agnew* v. *Moody*, 9 Cir., 330 F. 2d 868 (1964) (citing *Houston* with approval); *Ray* v. *Huddleston*, W.D. Ky., 212 F.Supp. 343, aff'd, 6 Cir., 327 F.2d 61 (1964); *Crawford* v. *Zeitler*, 6 Cir., 326 F.2d 119 (1964); *Duzynski* v. *Nosal*, 7 Cir., 324 F.2d 924 (1963) (citing *Houston* with approval); *Hurburt v. Graham*, 6 Cir., 323 F.2d 723 (1963); *Sires* v. *Cole*, 9 Cir., 320 F.2d 877 (1963); *Nesmith v. Alford*, 5 Cir., 318 F.2d 110 (1963); *Weller* v. *Dickson*, 9 Cir., 314 F.2d 598 (1963); *Kostal* v. *Stoner*, 10 Cir., 292 F. 2d 492 (1961); *Basista* v. *Weir*, W.D. Pa., 225 F.Supp. 619 (1964); *Norton* v. *McShane*, 5 Cir., ___ F.2d ___ (1964).

Therefore, in light of our findings that the factual situations are essentially the same in *Meyer* and *Van Steen-*

berg as in *Houston*, and that the law in regard to those facts is the same, we affirm the district court's application of stare decisis. The court properly determined all defendants to be immune from actions such as that alleged, and plaintiff's complaints were properly dismissed for failure to state a claim upon which relief could be granted.

IV. OTHER ISSUES.

Plaintiff places considerable reliance upon his assertion that he recovered a substantial judgment against Edmondson, a penitentiary guard, in an action he brought upon the same basic cause of action in the United States District Court of Kansas. Plaintiff sets out the instructions in said case and the judgment obtained in his reply brief. Such items are, of course, not a part of the record here. The instructions disclose that default had been entered against Edmondson and that the only issue submitted to the jury was the amount of damages since the claims of the plaintiff were not denied by the defendant. Under such circumstances, we find nothing in said case which has any persuasive effect upon the issues we are here considering.[4] No opinion has been filed in *Edmondson*. Needless to say, the Kansas case is not before us for review.

Plaintiff in substance further contends that his civil rights were violated by reason of the fact that during both of his periods of incarceration he was assigned a prison number, given a prison orientation course, required to perform hard labor, subjected to prison rules (which are not shown to be unreasonable) and also confined in the "hole." The Ninth Circuit recently in our view properly

4 The trial court makes a brief comment on the pendency of the Kansas case and the Rhodes-Edmondson relationship at p. 111 of 225 F. Supp.

rejected a similar contention in *Draper v. Rhay,* 9 Cir., 315 F.2d 193, 197, stating:

> "Because a defendant appeals a conviction, or questions it by a collateral attack, he is not entitled, pending a final determination, to his freedom; nor to enunciate to the warden the rules by which he is to be governed during his confinement.
>
> "There is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed.
>
> "Prison rules may require appellant to work but this is not the sort of involuntary servitude which violates Thirteenth Amendment rights. *Butler* v. *Perry,* 240 U.S. 328, 332, 36 S. Ct. 258, 259, 60 L. Ed. 672, where it was said:
>
> > "This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."

Plaintiff's claim that he was denied reasonable access to the courts while in prison is without merit. His pleadings show that he obtained an order fixing bail and that he obtained his release by filing bail on August 21, 1961. Ample time was available after his release on bail to permit the filing of a brief in his appeal from his contempt conviction or opportunity to apply for continuance if more time was needed. Moreover, *Rhodes* did not challenge in *Houston* the truth of the affidavits there filed by Sigler and Greenholtz to the effect that he was not denied the right to see counsel or visitors or to the use of the mails.

Other issues raised by the plaintiff have been given full consideration and found to be without merit.

The judgment appealed from in each of these cases is affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENTS OF THE COURT OF APPEALS

(Judgment)

United States Court of Appeals
for the Eighth Circuit
No. 17,580. September Term, 1963
Wednesday, August 5, 1964

Paul Rhodes,

Appellant,

vs.

Clarence A. H. Meyer, Cecil Brubaker, Dwain L. Jones, Robert A. Nelson, Gerald S. Vitamvas, Rush Clarke, James L. Macken, Peter E. Marchetti, Virginia A. Schuetz, Leo Knudtson, Carl Sanders, Norval Houston, Michael Linch, George Turner, Robert G. Simmons, Edward F. Carter, Fred W. Messmore, John W. Yeager, Harry A. Spencer, Leslie Boslaugh, Robert C. Brower, Richard M. Van Steenberg, Albert W. Crites, Ted R. Feidler, H. B. Evnen and J. Arthur Curtiss, John Greenholtz and Maurice Sigler, and George Lewis.

Appeal from the United States District Court for the District of Nebraska.

This Cause came on to be heard on the record from the United States District Court for the District of Nebraska. and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court entered on December 3, 1963, in this cause, be, and the same is hereby, affirmed.

August 5, 1964.

(Judgment)

United States Court of Appeals
for the Eighth Circuit
No. 17,588. September Term, 1963
Wednesday, August 5, 1964

Paul Rhodes,

Appellant,

vs.

Richard Van Steenberg, Clarence A. H. Meyer, Cecil Brubaker, Robert A. Nelson, Gerald S. Vitamvas, Rush Clarke, Clarence S. Beck, James L. Macken, Virginia A. Schuetz, Leo Knudtson, Carl Sanders; John Doe, real name unknown, Sheriff of Douglas County, Nebraska, on November 2, 1961, Norval Houston, Jack Knudtson, Albert W. Crites, John Greenholtz and Maurice Sigler.

Appeal from the United States District Court for the District of Nebraska.

This Cause came on to be heard on the record from the United States District Court for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court entered on December 16, 1963, in this cause be, and the same is hereby, affirmed.

August 5, 1964.

APPENDIX C

ORDERS STAYING ISSUANCE OF MANDATES

"On consideration of motions of appellant for a stay of the mandates in these causes pending petitions to the Supreme Court of the United States for writ of certiorari, it has been ordered by this Court that issuance of the mandates in these causes be stayed until September 25, 1964. If within this period of time there is filed with the Clerk of this Court certificates of the Clerk of the Supreme Court of the United States that petitions for writ of certorari and record have been filed, the stays which have been granted shall continue until the final disposition of the cases by the Supreme Court."

APPENDIX D

ADDITIONAL STATUTES INVOLVED

28 U. S. C. # 1343 (28 U, S. C. A. # 1343):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U. S. C. (1958 ed.) # 1331 (28 U. S. C. A. # 1331):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

42 U. S. C. A. # 1985 (2):

"Two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any state or territory, with intent to deny citizens the equal protection of laws or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the law."

42 U. S. C. A. # 1985 (3):

"In any cause of conspiracy set forth in this section, if any one or more persons engaged therein do, or cause to be done, any act in the futherance of the

object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators."

Title 42 U. S. C. A., Sec. 1986, provides:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrong act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action. * * *"

UNITED STATES CONSTITUTIONAL AMENDMENTS

Amendment 4, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when

in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 6, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment 8, United States Constitution:

"Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment 14, Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

PAUL E. RHODES,
Plaintiff

vs. No. T-3405

HARRY W. EDMONDSON,
Defendant.

THE COURT'S INSTRUCTIONS

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, the time has come to instruct you as to the law governing the case.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

If, in these instructions, any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions, and as a whole, and you are to regard each instruction in the light of all the others.

You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as

to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

This action was commenced by the filing of a complaint by the plaintiff, Paul E. Rhodes in the United States District Court for the District of Kansas on September 24, 1963 against the defendant Harry W. Edmondson.

It is alleged in the complaint that:

1.

Plaintiff is a citizen of the United States and a citizen and resident of the state of Nebraska.

2.

That the defendant is a citizen of the United States and a citizen and resident of the state of Kansas, and a citizen of the United States of America, and was from the period of January 23, 1961 to and including August 21, 1961, a guard at the Nebraska State Penitentiary, and was at all times hereinafter mentioned and at all times pertinent hereto acting within the scope of and under the color of that office as an employee and officer of the State of Nebraska in his official capacity, and acting under color of statute, ordinance, regulation, customs, and usage of the State of Nebraska and under the Direction of Maurice H. Sigler, warden of the Nebraska Penitentiary, and Clarence A. H. Meyer, Attorney General of the State of Nebraska.

3.

On or about November 21, 1960 the plaintiff over his

protest on file in writing was tried *in absentia* in the District Court of Morrill County, Nebraska, for contempt of court before Richard M. Van Steenberg, District Judge. The plaintiff was not present in person nor was he represented by Counsel. Notwithstanding his absence and the lack of representation by counsel the plaintiff was putatively, in absentia, tried for the offense of "Contempt of Court" sentenced to nine (9) months hard labor in the Nebraska State Penitentiary and was subjected to the imposition of a $2,500.00 fine and costs of the action.

At the Conclusion of said hearing TRIAL IN ABSENTIA the trial court entered the following order in part to-wit:

> "Now on this 21st day of November, 1960, one of the regular days of the September, 1960 term of this court this matter came on to be heard * * *. The State was represented by the County Attorney, James L. Macken. The defendant was not present and was not represented by counsel. * * * The matter came on further to be heard on its merits. The state introduced additional evidence * * *. The court being fully advised upon the premises finds the defendant guilty of Contempt as charged, and that he should be sentenced to confinement in the Nebraska State Penitentiary for a period of nine months at hard labor, Sundays and Holidays excluded, and to pay a fine of $2,500.00 and the costs of this proceeding.
>
> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of nine (9) months at Hard Labor, Sundays and Holidays excepted, and to pay a fine in the amount of Two Thousand Five Hundred dollars ($2,500.00) and the costs of this Proceeding. By the Court: /s/ R. M. Van Steenberg, District Judge."

That this plaintiff was served with no Notice of said hearing, and that a false affidavit that he had been was filed or caused to be filed in the files of said case by James L. Macken, County Attorney of Morrill County, Nebraska, with intent to deceive the Court and the party to this action, this plaintiff.

That prior thereto in the same action in Absentia, in the absence of this plaintiff, and without notice to this plaintiff of any kind, a hearing was held on September 28th, 1961 in which the County Attorney, James L. Macken and R. M. Van Steenberg, the District Judge, and R. B. Nichols, the Court Reporter were present and material evidence was introduced and a witness *badgered* into testifying the way they wanted him to, in order to secure release by a said witness from prison, and after so testifying was released from prison, by said James L. Macken, the County Attorney, all in violation of Due Process of Law and Equal Protection of Law Clauses of the 14th Amendment of the United States Constitution, and in violation of the Statutes of the State of Nebraska and the Nebraska Constitution, and all done with intention to deny this plaintiff his Federal Civil Rights and Federal Constitutional Rights.

That on November 21, 1960 this plaintiff was not under bond or recognizance to appear before the District Court of Morrill County, Nebraska, in said Case 4819 Contempt proceeding above referred to and was not in body on November 21, 1960 within the Territorial Jurisdiction of said Court, and therefore the Court had no jurisdiction over the body of this plaintiff on November 21, 1960.

On or about November 2, 1960 the Clerk of the District Court of Morrill County, Nebraska, acting under the color

of her office and authority as such in the complete absence of any mittimus or other direction by the District Court issued an "Order of Commitment" in words and figures as follows:

> "State of Nebraska, Morrill County ss. To the Sheriff of said County: WHEREAS, At a regular term of the District Court for said County which term was begun and held at the Court House, in Bridgeport, in said County, on the 16th day of April, 1960; Present, the Hon. R. M. Van Steenberg, one of the judges of said Court:
>
> AND, WHEREAS, Clarence S. Beck, Attorney General for the State of Nebraska, on the 20th day of July, 1960, came into Court, and presented a certain information in due form of law, against Paul E. Rhodes for Contempt of Court which information was by order of the Court filed and the cause docketed, and afterwards on the 6th and 7th days of September and the 21st day of November, 1960, further proceedings were had upon said information. To-wit: ON TRIAL TO THE COURT the said Paul E. Rhodes was put upon his trial and said Court entered a Judgment of 'Guilty of Contempt as charged'. And, Whereas, on the 21st day of November, the said Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.'
>
> You are therefore commanded to proceed to execute the said sentence and order of this court.
>
> WITNESS my hand and seal of said Court at Bridgeport, Nebraska, this 23rd day of November, 1960. /s/ Virginia A. Schuetz, Clerk of the District Court."

4.

Thereafter on January 16th, 1961 under color the "Order

of Commitment" referred to in Paragraph 3 above and at the specific direction of the County Attorney of Morrill County, Nebraska, one W. W. Schulz, the then Sheriff of Cheyenne County, Nebraska, without a warrant, placed this plaintiff under arrest and then and there imprisoned him in the County Jail in Cheyenne County, Nebraska.

5.

On January 16th, 1961, the plaintiff applied to the District Court of Cheyenne County, Nebraska, the Honorable John H. Kuns, District Judge, by written petition for a Writ of Habeas Corpus, on the grounds that the District Court of Morrill County had no jurisdiction, power or authority, (a) to try the case in the absence of the defendant, (b) to enter judgment and pass sentence in the absence of the defendant, (c) to pronounce sentence of imprisonment in the Nebraska State Penitentiary for nine (9) months, at hard labor, and fine of $2,-500.00 and costs for the offense of contempt of court, or (d) to sentence to hard labor for such offense, and (e) that contempt of Court is not a crime in Nebraska, and the petition further alleged that the District Court of Morrill County had no jurisdiction because it had been divested of jurisdiction by a previous habeas corpus action which released plaintiff and discharged him from such custody and charge of contempt, and that the District Judge trying the case was disqualified to sit on the matter, and that the arrest was by virtue of a Warrant of Commitment which petitioner had not seen, that the District Judge, John H. Kuns on reading the Petition on January 16, 1961 entered the following order, to-wit:

> "On reading the petition of Paul E. Rhodes duly verified whereby it appears that he is illegally imprisoned and restrained of his liberty by W. W. Schulz, Sheriff

of Cheyenne County, Nebraska, and stating wherein the illegality consists from which it appears that he is entitled to a writ of habeas corpus and that the same shall issue; produce to me a copy of the order of conviction and commitment and cause of his detention by which said Paul E. Rhodes is deprived of his liberty, and it appearing to me that the said Paul E. Rhodes is unlawfully detained, it is therefore ordered that a writ of habeas corpus be allowed to issue in favor of Paul E. Rhodes returnable forthwith and directed to W. W. Schulz, sheriff and Kermit Braumbaugh, deputy sheriff. BY THE COURT /s/ John H. Kuns, District Judge."

Said writ of habeas corpus was duly issued and return thereof was made by W. W. Schulz, Sheriff of Cheyenne County, Nebraska. That said Cheyenne County Sheriff made the return in part as follows:

"That the authority and true and whole cause of such imprisonment is by reason of the direction of the County Attorney of Morrill County, Nebraska, James L. Macken and the Sheriff of Morrill County, Nebraska, Norval Houston, pursuant to an order Judgment and Journal Entry of the District Court of Morrill County, Nebraska of November 21, 1960, a copy of which is hereto attached and herein made a part of this return the same as if copied in full herein. That a copy of said warrant of commitment is hereto attached and herein made a part of this return the same as if copied in full herein. That a copy of said warrant of commitment is hereto attached and herein made a part of this return the same as if copied in full herein. In obedience to the writ of habeas corpus issued herein he now produces the body of the said Paul E. Rhodes before John H. Kuns, District Judge of Cheyenne County, Nebraska, and the District Court of Cheyenne County, Nebraska, to be dealt with according to law."

The two exhibits were delivered to the court. John H.

Kuns, Judge, with said return and with this plaintiff's body, and all done on January 16, 1961.

Thereafter, on January 16th, 1961, the District Court of Cheyenne County, Nebraska in said Habeas Corpus proceeding being Case No. 6617 entered in part the following order, to-wit:

> "And thereafter, on the same day, the Court having carefully examined the petition and the return to the writ of Habeas Corpus and it appearing to the court that the order of the District Court of Morrill County, Nebraska set out in the petition and referred to in the return is not a warrant or commitment, on the court's own motion it is ordered that the relator be discharged on the sole ground that his arrest by respondents was not by virtue of any warrant or order of commitment. It is further ordered that the court's earlier order fixing bail be and is hereby vacated."

The plaintiff was forthwith discharged from custody and set at large and no error proceeding, appeal, or other review was sought of said order setting this plaintiff at large and the same was a final judgment.

6.

On January 23, 1961 this plaintiff in the courthouse building at Sidney, Nebraska, being the Courthouse building for Cheyenne County, Nebraska the plaintiff while in attendance at court, was placed under physical arrest by Norval Houston, Sheriff of Morrill County, Nebraska, James L. Macken, County Attorney of Morrill County, Nebraska and others, and under the direction of said James L. Macken, and such action taken under the color of the commitment heretofore referred to and at gun point forceably handcuffed.

No warrant or valid commitment had ever been issued for the arrest or detention of this plaintiff and no order of the court in the District Court of Morrill County, Nebraska, had been entered since November 21, 1960 and said parties took such action in disobedience of the order of the District Court of Cheyenne County, Nebraska referred to in the above paragraphs. That the action was done with the intent to deny this plaintiff, Paul E. Rhodes equal protection of the law and to deny him due process of law all in violation of the XIV Amendment of the Constitution of the United States and that the same had been planned by said parties heretofore named under the circumstances as herein alleged and in agreement with Clarence A. H. Meyer, Attorney General of the state of Nebraska, and Maurice Sigler, Warden of the Nebraska State Penitentiary. That this plaintiff on January 23, 1961 demanded the assistance of legal counsel and such demand was refused.

7.

That plaintiff was forceably removed from Cheyenne County, Nebraska to Lincoln, Lancaster County, on said date of January 23, 1961, held incommunicado some 400 miles away and committed to the Nebraska State Penitentiary as Convict No. 21675 to serve said sentence at hard labor.

8.

On January 23, 1961 at the time of plaintiff's apprehension, arrest, and incarceration, there was no valid judgment or sentence pronounced against the plaintiff the purported judgment and sentence having been adjudged in the absence of the plaintiff. At the time of his apprehension, arrest and incarceration the plaintiff was purportedly charged

with a criminal offense while the fact is that the contempt for which the plaintiff was purportedly tried was in fact a civil proceeding in that by reason of the statutes then and there in force in the State of Nebraska the Court that pronounced such judgment was without jurisdiction or authority to do so. That the Court of Morrill County was without jurisdiction to pronounce judgment and sentence to the penitentiary of Nebraska at hard labor under such statutes last above referred to, and the offense of Contempt of Court not being a crime under Nebraska Statutes, said purported judgment constituted Involuntary Servitude and was repugnant to the XIII and XIV Amendments of the United States Constitution.

9.

That in said case No. 4819 of the District Court of Morrill County, Nebraska heretofore referred to, proceedings were had therein on September 28, 1960 without any notice whatever to this plaintiff and he was not present in body or by counsel, and a material witness was called and examined in said case, about material matters in said case with only the Judge, prosecuting attorney and the Court Reporter present, said witness being promised freedom from jail and restored to his liberty if he would testify as directed by the prosecuting attorney and he so testified and was restored to his liberty constituting unconstitutional duress and denial of due process of law in violation of the XIV Amendment of the United States Constitution.

10.

That the defendant herein, Harry W. Edmondson knowingly after the discharge and setting at large of this plaintiff on January 16, 1960, in Habeas Corpus by the District Court of Cheyenne County, Nebraska, knowingly aided and

assisted in the recommitment and imprisonment of this plaintiff, Paul E. Rhodes on January 23, 1961 to and including August 21, 1961 in the Nebraska State Penitentiary at Lincoln, Nebraska, at the specific direction of Maurice Sigler, Warden of the Nebraska State Penitentiary and Clarence A. H. Meyer, Attorney General of the State of Nebraska, and did so knowing that the District Court of Morrill County, Nebraska had entered no further order after the Discharge in Habeas Corpus of January 16, 1961, by the Cheyenne County, Nebraska District Court.

11.

That the actions of the defendant Harry W. Edmondson, above described constituted a deprivation of this plaintiff's Federal Civil Rights and constitutional rights repugnant to the provisions of the United States constitution set out in the jurisdictional statement of this complaint, and a denial of the due process of law and equal protection of law to this plaintiff in violation of the 14th Amendment of the United States Constitution and a denial of equal protection of the law to this plaintiff pursuant to Section 29-2809 R. R. S. Nebraska 1943 which forbids recommitment or imprisonment after discharge in Habeas Corpus and reads as follows, to-wit:

> "Applicant discharged; rearrest for same offense prohibited; penalty; exceptions. Any person who shall be set at large upon any habeas corpus shall not again be imprisoned for the same offense, unless by legal order or process of the court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause or offense. If any person shall knowingly, contrary to Sections 29-2801 to 29-2824, recommit or imprison, or cause to be recommitted or imprisoned for the same offense or pretended offense, he shall forfeit to the party aggrieved

five hundred dollars, any colorable pretense or variation in the warrant or commitment notwithstanding."

12.

That during the shift of the defendant, during the period of January 23, 1961 to May 12, 1961, on certain days the defendant denied the plaintiff use of Sanitary Facilities, and toilets which caused this plaintiff great mental and physical pain, and greatly injured the health of this plaintiff and caused this plaintiff to suffer great physical pain and anguish, and at times excruciating physical pain and this during the unlawful imprisonment of this plaintiff by the defendant in violation of Article I, Section 9 of the United States Constitution, suspending the Writ of Habeas Corpus and the XIV Amendment of the United States Constitution.

As a direct and proximate result of the aforesaid acts of the defendant this plaintiff has suffered great bodily pain, injury and mental anguish from then until now and will continue to so suffer in the future; and he has lost and will in the future lose large sums of money by reason of having been humiliated and held up to public scorn and derision as a result of the foregoing acts of the defendant.

Wherefore, plaintiff demands judgment against the defendant in the amount of five hundred dollars ($500.00) liquidated actual damages suffered as prescribed by Section 29-2809, R R. S. Nebraska 1943, Reissue of 1956 plus the costs of the action and he further demands punitive damages against the defendant in the amount of One Hundred Million Dollars ($100,000,000.00) plus the costs of this action and further demands judgment for actual damage to his business, professional standing, and to his invest-

ment income and for physical pain, suffering and anguish and actual damages to the plaintiff's health in the sum of One Hundred Million Dollars ($100,000,000.00) and further demands such other and further relief as to this court seems just and equitable.

INSTRUCTION NO. 3

You are instructed that Section 1983 of Title 42, United States Code provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

You are further instructed that Federal District Courts have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

You are further instructed the action here is a proper proceeding for redress.

INSTRUCTION NO. 4

In view of the fact that plaintiff herein has been granted

a default judgment, the allegations of the complaint must be considered by you as a conclusive adjudication that the plaintiff's civil rights herein have been violated and that the defendant herein has deprived this plaintiff of certain civil rights in the manner set forth and described in plaintiff's complaint.

Under such circumstances as I have instructed you previously, the only matter for you to determine will be the amount of damages which the plaintiff has sustained, since the claims of the plaintiff are not denied by the defendant.

INSTRUCTION NO. 4a

It is alleged, and you must consider that the defendant, Harry W. Edmondson, was a part of a conspiracy, which conspiracy deprived this plaintiff of certain civil rights as set out in the complaint. Under these circumstances, any acts by Edmondson are, what is called under the law, overt acts in furtherance of the conspiracy.

Therefore, in considering damages sustained by this plaintiff, you are entitled to consider all damages which, under the evidence, proximately resulted from the plaintiff being deprived of his civil rights.

INSTRUCTION NO. 5

You are hereby instructed that the defendant Edmondson knowingly aided, abetted and assisted in the reimprisonment and recommitment of the plaintiff in this action to involuntary servitude after his discharge in habeas corpus of the District Court of Cheyenne County, Nebraska and this recommitment violated 29-2809, R. R. S. Nebraska 1943 which provides for $500.00 liquidated damages for the recommitment. Accordingly you shall award the plaintiff a judgment of $500.00.

INSTRUCTION NO. 6

You will allow, by your verdict, such actual damages as will, in your judgment, under the evidence, fairly and adequately compensate the plaintiff herein for the injury and damage sustained as a direct and natural consequence of being deprived of his civil rights by the defendant herein, and in arriving at the amount of plaintiff's actual damages, if any, you may not allow him more than $100,000,000, the amount prayed for in the complaint.

INSTRUCTION NO. 7

In assessing the amount of actual damage the plaintiff has actually suffered as a result of being deprived of his civil rights by this defendant you may consider loss to the plaintiff's business; loss in professional standing; loss in investment income; loss as a result of being held in public scorn; loss from being imprisoned in the Nebraska State Penitentiary as Convict No. 21675; loss from mental and physical anguish; loss to his health; loss from suffering and embarrassment; loss for degradation in standing in the community, and any other loss to this plaintiff, such as his vehicle operator's license, which proximately resulted from this plaintiff being deprived of his civil rights.

INSTRUCTION NO. 8

After you have determined, under these instructions, the amount of actual damages, if any, that plaintiff has proximately sustained from being deprived of his civil rights by this defendant, you will then determine the amount that plaintiff is entitled to recover as punitive damages.

Punitive or exemplary damages is commonly called smart-money. If the conduct of a defendant is such as to amount to a wanton and reckless disregard of a right of the plain-

tiff in the enjoyment of his rights as a citizen, and discloses such gross neglect of duty by a defendant as to evince a reckless indifference to the rights of that plaintiff, then a plaintiff is entitled to punitive damages. In this case punitive damages should be assessed and in assessing such damages you may take into consideration the following items:

(1) The expense in preparation for trial by plaintiff; and

(2) An amount as shall be an example to others to deter them from such conduct.

The amount should not be so small as to be trifling nor so large as to be unjust, but such as candid and dispassionate minds can approve as a punitive example and as a warning to others against a similar lapse of duty.

If you should award such damages you are instructed that you may not award more than $100,000,000 to the plaintiff.

INSTRUCTION NO. 9

In summarizing, the damages are separated into three categories:

1. $500.00 Nebraska Statutory damages for recommitment after discharge from habeas corpus;
2. Actual damages plaintiff has suffered; and
3. Punitive damages.

INSTRUCTION NO. 10

During the trial of this case certain testimony has been read to you by way of deposition. The testimony of a witness who for some reason cannot be present to t tify

from the witness stand is usually presented in writing under oath in the form of a deposition. Such testimony is entitled to the same consideration and, in so far as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

INSTRUCTION NO. 11

There are certain other general principles governing the manner in which you should approach your duties in this case which I should like to mention to you at this time.

I should like to instruct you that you are the sole judges of the credibility of the witnesses and of the testimony that you have heard. In determining the credibility of witnesses, you have a right to take into consideration the demeanor of such witness or witnesses on the stand, his candor and sincerity in testifying; or the lack of the same; his interest or lack of interest in the outcome of the suit; his knowledge or lack of knowledge concerning the facts about which he testifies; his prejudices or biases, if any are shown, his relationship, if any, to either party to the suit, and such other facts and circumstances, as disclosed by the evidence, as will assist you in determining the weight you should give to the evidence in the case.

If you find that any witness knowingly testified falsely to any material fact in issue in this case, I instruct you that you may disregard all of the evidence of such witness wherein such evidence is not corroborated by other evidence.

INSTRUCTION NO. 12

You are to consider only the evidence in the case. But

in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary.

In the law it is presumed that a witness speaks the truth and this presumption continues in effect until overcome or outweighed by evidence to the contrary, and unless so outweighed, the jury is bound to find in accordance with the presumption.

INSTRUCTION NO. 13

When you retire to deliberate upon this case, each juror should exercise his individual judgment, so that when a verdict is agreed upon it will constitute the verdict of each individual juror.

In arriving at a verdict, each juror should give due consideration to the views and opinions of the other jurors, and should listen to their arguments with a willingness to be convinced and to yield to their views, if induced to believe them to be correct; but no juror should agree upon a verdict unless he is convinced that the same is correct, and such as his conscience approves, and such as each juror under his oath, after full consideration, believes to be right.

INSTRUCTION NO. 14

Upon retiring to the jury room you will select one of your number to act as foreman. The foreman will preside over your deliberations and be your spokesman in court.

A form of verdict has been prepared for your convenience.

The Court instructs you that under the evidence the plaintiff is entitled to recover the statutory penalty prayed for in the amount of $500.00. You should then determine the amount of actual damages to which you find plaintiff entitled and insert that amount in paragraph 2 of the form of verdict. You should then determine the amount of punitive damages to which the plaintiff is entitled and insert that amount in paragraph 3 of the form of verdict.

You will take the form to the jury room and when you have reached a unanimous agreement as to your verdict, you will have your foreman fill in, as directed, date and sign the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the court room.

INSTRUCTION NO. 15

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the Court by any means other than a signed writing in a sealed envelope. And bear in mind you are not to reveal to the Court, or to any person, how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

The bailiff will come forward to be sworn.

VERDICT

1. We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, Paul E. Rhodes in the amount of $500.00, the statutory penalty provided for recommitment after discharge from habeas corpus.

2. We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, Paul E. Rhodes, and assess his *actual* damages at $225,000.00.

3. We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, Paul E. Rhodes, and assess *punitive* or *exemplary* damages in the amount of $225,000.00.

/s/ Charles Baston
Foreman

April 15, 1964
Date